Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In re Applications of	)	
	)	
SPRINT CORPORATION,	)	
Transferor,	)	
	)	
and	)	
	)	
MCI WORLDCOM, INC.	)	CC Docket No. 99-333
Transferee,	)	
	)	
for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and Parts 1, 21, 24, 25, 63, 73, 78, 90, and 101	)	

REPLY COMMENTS OF BT NORTH AMERICA INC.

BT North America Inc. ("BTNA"), by counsel and pursuant to public notice, 1/ hereby replies to the comments filed on the captioned merger between MCI WorldCom, Inc. ("MCI WorldCom") and Sprint Corporation ("Sprint"). The comments in this proceeding demonstrate that the merger of Sprint and MCI WorldCom will have a severe negative impact on competition in the Internet backbone market unless the Commission requires divestiture of significant Internet backbone assets by the companies.

1/ *Commission Seeks Comment on Joint Applications for Consent to Transfer Control filed by MCI Worldcom, Inc. and Sprint Corporation,* CC Docket No. 99-333, Public Notice, DA 00-104 (rel. Jan. 19, 2000).

I. THE COMMENTS ESTABLISH THAT THE PROPOSED MERGER WOULD HAVE UNACCEPTABLE CONSEQUENCES FOR THE INTERNET BACKBONE MARKET

As recently as 1998, this Commission found that the market for Internet backbone services constitutes a separate relevant product market and that a merger of the two largest Internet backbone providers would lead to anticompetitive effects in that market. 2/ Sprint was one of the major proponents of this position. Internet backbone providers, which route traffic between ISPs and interconnect with other Internet backbone providers, compete with one another for ISP customers, content providers, and other end-user customers. In addition, the so-called "top tier" Internet backbone providers compete to provide "universal connectivity" to backbone providers not in the "top tier." MCI WorldCom and Sprint are the two leading "top tier" providers of "universal connectivity."

A merger of MCI WorldCom and Sprint would eliminate one of the two largest providers in the already-concentrated market for Internet backbone services. The combined entity would be, by far, the largest single Internet backbone provider, with the ability and incentive to engage in anticompetitive discrimination against other Internet backbone providers. Because of the dynamics of the Internet backbone market, 3/ the merger would create a dominant Internet backbone

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2/ *See* Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., *Memorandum Opinion and Order*, FCC 98-225, CC Docket No. 97-211 (rel. Sept. 14, 1998).

3/ *See, e.g.*, Petition of AT&T Corp. to Deny Application at 3–7; Petition of GTE Service Corporation and GTE Internetworking to Deny Application or Condition Merger on Fully Effective Internet Backbone Divestiture at 3–12; Comments of

provider with the ability to exercise market power in the provision of Internet backbone service.

Larger Internet backbone providers have a clear competitive advantage for a number of reasons. Connectivity at Network Access Points ("NAPs") is an inadequate substitute for private peering arrangements because of congestion at NAPs and the fact that core Internet backbone providers tend to assign a low priority to maintaining and upgrading NAPs. 4/ Although the "top tier" Internet backbone providers may exchange traffic in private peering arrangements on a settlements-free basis, they charge "transit fees" to smaller Internet backbone providers.

Barriers to entry into the "top tier" Internet backbone market to provide "universal connectivity" remain high. Unable to acquire settlements-free private peering arrangements, 5/ smaller Internet backbone providers find themselves disadvantaged in attracting large customers. Large business customers, seeking maximum reliability, often insist that ISPs bidding for their business use Internet backbone providers that have a specified amount of private peering with particular Tier 1 Internet backbone networks.

Global Crossing Telecommunications, Inc. at 6–9; Comments of Cable & Wireless, Inc. at 7–16.

4/ *See* Petition of AT&T Corp. to Deny Application at 4–5.

5/ For example, Global Crossing Telecommunications states that Sprint rejected a proposed peering arrangement with Global Crossing because of a traffic exchange ratio that would have exceeded 2:1. Comments of Global Crossing Telecommunications, Inc. at 7.

The "network effect" applies with great force here: The value of an Internet backbone network increases with the total number of users who join the network, particularly larger customers who provide content demanded by other customers. As AT&T points out, it has recently been reported that MCI WorldCom (including UUNet) and Sprint, taken together, host 234 of the 500 busiest Web sites. Estimates of the market shares of customers wishing to view those Web sites show that a combination of MCI WorldCom and Sprint would concentrate a majority of all traffic in the hands of one Internet backbone provider. Thus, the market is already highly concentrated, and the combination of the two largest Internet backbone providers would, through the operation of network effects, lead to the creation of a dominant firm and the "tipping" of the market.

The combination of these factors leads to the inescapable conclusion that combining the Internet backbones currently owned by MCI WorldCom and Sprint would create a single entity with the ability and incentive to limit competition and raise prices. Because of the size of the merged entity's network relative to that of its closest competitors, it would have little or no incentive to enter into settlements-free peering arrangements with any other Internet backbone provider. Instead, it would have the ability and incentive to charge other Internet backbone providers transit fees above competitive levels, which would only further weaken those other Internet backbone providers. As a result, the market would ineluctably "tip" toward monopoly.

In the absence of competitively effective divestiture, the only other check on such a dominant provider would be government regulation of the Internet backbone, which this Commission has so far worked diligently to avoid. 6/ The Commission should bear in mind a historical parallel. During the early years of the twentieth century, the Bell System companies and independent companies built local telephone systems, in some locations in competition with one another. But the Bell System had a virtual monopoly over long-distance telephony and in many local markets had predominantly large market shares. The Bell System companies used their market power by, e.g., denying interconnection to the independent companies, to force the large majority of the independents to sell out to the Bell System. This growing monopoly was arrested only by the intervention of the U.S. Department of Justice, which in 1913 prohibited the Bell System companies from acquiring independent companies and required the Bell companies to interconnect with the remaining independent companies. 7/ This was followed by the 1914 enactment of the Clayton Act, the 1934 Communications Act, and many decades of extensive federal and state regulation of the telephone industry.

6/ *See* Jason Oxman, Office of Plans and Policy, Federal Communications Commission, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999), at 22–23.

7/ *See generally* Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures, *First Report*, FCC 76-879, 61 FCC 2d 766 (1976); Application of General Telephone & Electronics Corporation to Acquire Control of Telenet Corporation and Its Wholly-Owned Subsidiary, Telenet Communications Corporation, *Memorandum Opinion & Order*, FCC 79-261, 72 FCC 2d 91 (1979).

To avoid the need for similar massive regulation of Internet backbone, the FCC needs to act now to prevent further concentration. Regulation is a poor substitute for market forces and should be avoided unless market forces are ineffective in achieving competitive results. Today, the United States' telecommunications network is being completely re-engineered based on the Internet Protocol, making possible a revolution in new and diverse infrastructures, applications, and services. This market is still in its early stages of development and is the driving force of a new economy. Allowing monopoly or near-monopoly to develop in the market for core Internet backbone services would have wide ramifications for *all* businesses. The need to maintain competitive balance is of the utmost importance. The Commission can continue to avoid substantial government regulation of this industry if it acts swiftly and decisively to prevent harmful concentration in the Internet backbone business, particularly the provision of universal connectivity.

In sum, the Commission should not allow the establishment of a dominant monopoly Internet backbone provider, which would make economic regulation an unfortunate necessity. The Commission should not permit the merged entity to control both MCI WorldCom's and Sprint's Internet backbones.

II. RECENT HISTORY DEMONSTRATES THAT THE ONLY EFFECTIVE REMEDY WOULD BE DIVESTITURE OF UUNET

On March 1, 2000, MCI WorldCom and Cable & Wireless announced that they had settled what they called their "commercial dispute" over C&W's

purchase of MCI's former Internet business ("iMCI") for $200 million. 8/ C&W had alleged that MCI had not handed over the complete business: "The iMCI business transferred to C&W was a significantly weaker competitor as a stand-alone business than as an MCI operating unit." 9/ The $200 million settlement actually validates C&W's claims and supports its position in this proceeding that, "[i]n cases where business assets and operations are integrated into an entity's other activities, it is inherently problematic, if not futile, to suggest that forcing the divestiture of those assets will result in a viable stand-alone competitor from day one, particularly when the divesting entity will continue to compete in the same market segment." 10/ To be sure, the press release states that C&W "has agreed to withdraw all litigation and regulatory complaints associated with the transaction." 11/ But despite the settlement, C&W has not withdrawn its comments in the present proceeding, and the Commission should pay close attention to them. In those comments, C&W strongly supports the divestiture of UUNet as a prerequisite condition for any merger approval.

Given the various tribunals' recognition that a divestiture of MCI's Internet business was necessary for clearance of the WorldCom-MCI merger and

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8/ "MCI WorldCom and Cable & Wireless Settle Internet Dispute," Press Release, March 1, 2000, <http://www.wcom.com/about_the_company/-press_releases/display.phtml?cr/20000301> (hereinafter Settlement Press Release).

9/ Comments of Cable & Wireless, Inc., at iv.

10/ Comments of Cable & Wireless, Inc., at ii–iii.

11/ *See* Settlement Press Release, *supra* note 8.

the failure of that divestiture to create an effective competitor, *any* further diminution of a major competitor would have unacceptable consequences in the Internet backbone market. The failure of the iMCI divestiture demonstrates that a carve-out of Internet backbone assets that are currently well-integrated into other telecommunications businesses of the divesting entity just would not work. The divested pieces would not constitute a strong competitor, and the relevant Internet backbone market would be substantially less competitive as a result.

Therefore, as several commenters argue, the only effective remedy is to require a divestiture of an Internet backbone business to an entity that would continue to be a viable and strong Internet backbone provider. As C&W itself argued in February:

> C&W's experience in acquiring iMCI as part of the MCI WorldCom merger is highly instructive in evaluating MCI WorldCom's latest proposed merger. The Commission should take away two primary lessons from this experience. *First,* MCI and Sprint must be required to divest the Internet backbone asset that is least integrated with their other telecommunications and non-Internet business activities. *Second,* the Commission cannot rely on MCI to honor its commitments to fully and completely divest an Internet backbone business. 12/

C&W also demonstrated persuasively that Sprint's existing Internet business is more tightly integrated into Sprint's other telecommunications activities than UUNet is integrated into MCI WorldCom's. The divestiture of Sprint's Internet business would face the same difficulties as the failed divestiture of iMCI. By

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12/ Comments of Cable & Wireless, Inc., at iii. C&W's second point suggests that the arguments in favor of divestiture of UUNet may not be merely structural, i.e., based on an economic analysis of accumulated market power, but may also be justified on the ground of its "pattern and practice of non-compliance." *See id.* at iv.

contrast, UUNet "does not appear to be substantially integrated into MCI" and appears to have its own separate sales, technical, and engineering staff. Its divestiture would be far more likely to succeed. 13/ BTNA understands that Internet customers have already been switching from Sprint to UUNet in anticipation of the carve-out of Sprint assets and out of concern that the former Sprint business will not be a strong and reliable service provider. Thus the anti-competitive benefits of the proposed merger are already accruing to MCI WorldCom.

In short, as the comments make clear and BTNA strongly believes, the only public policy solution for the Internet backbone problem created by the proposed merger (short of rejecting the merger altogether) is to require:

- divestiture by MCI WorldCom of UUNet (not Sprint's Internet business, as MCI WorldCom dearly would prefer),
- to a financially strong and sophisticated buyer that has relevant experience in the Internet and/or telecommunications fields,
- with the details of that divestiture being subject to prior approval and compliance monitoring by the appropriate antitrust and regulatory authorities in a transparent process open to public comment.

13/ *Id.* at 41–44.

14/ *See id.* at 45.

CONCLUSION

For the reasons stated above, the Commission should, if it approves the proposed merger, condition that approval upon MCI WorldCom's prior successful divestiture of UUNet under conditions likely to ensure that the divested UUNet will remain an effective competitor in the market for Internet backbone services.

Respectfully submitted,

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